CORRESPONDENCE.

ADVERSARY POSSESSION ONCE MORE.

Editor Virginia Law Register:

The article in the May REGISTER (4 Va. Law Reg. 1) by Hon. W. F. Sims, on the "Open Question," raises a point of great interest.

The proposition that at the common law possession by the true title holder of any part of his land prevented an actual, adverse, exclusive possession by a junior claimant from ripening into a prescriptive title, if sound, furnishes an unanswerable argument for deciding the open question in favor of the true title holder, and it would also prove that our statute (Code, sec. 2740) was intended to change the common law.

Mr. Sims says:

"The statute therefore restricted the operation of said constructive possession of the senior title holder in so far as it *might have otherwise overridden the pedis positio of the actual settler.*"

The theory of the common law entertained by Mr. Sims is that an actual, exclusive possession for the prescriptive period by an adverse claimant gave him no title to even his *pedis positio* against a true title holder who had all the time been in the actual possession of some other part of his land.

It is admitted that where there has been an *actual* possession and use by both claimants of the *same* land or house, the possession was held to have been always in the true title holder. And the citation from Littleton (2 Th. Co. Lit. 299), where the two claimants were both continually abiding in the same mese (house) goes no further than this. An apt illustration of this rule is given in a case cited by Adams, where the true owner and an untitled stranger for many years both partook of the rents and profits of the land, in which it was held that no adverse right had been acquired. Adams, Ejectment, p. 54. See. also, *Farley* v. *Shippen*, Wythe, 264. Where, for instance, both claimants had grazed their stock on the same pasture, or both had taken wood from the same forest, this rule applies. But these authorities do not cover the case where neither claimant has had actual possession of a part of the disputed territory.

Mr. Sims' theory is based on the rule that "possession of part is possession of the whole." But was such ever the rule where there was an actual adverse possession?

"Possession of part of a tract is possession of the whole, *where there is no adverse possession thereof.*" *Skinner* v. *Moore* (S. C.), 30 Am. Dec. 155.

". . . . *Where there is no adverse possession*, the law construes the entry to be coextensive with the grant to the party." *Hicks* v. *Coleman* (Cal.), 85 Am. Dec. 112.

"*Where there is no interference of surveys*, possession of part is in law the possession of the whole." Lomax, Dig. 798.

"*Where there is no interference*, possession of part is possession of the whole." Adams Eject. note, p. 54.

"Owner's possession of part extends over the whole tract, *except so far as there is an actual adverse occupancy.*" Note, 39 Am. Dec. 687.

"Where a person enters into land under a claim of title thereto . . . . he is deemed to have seisin [possession] of the land coextensive with the boundaries stated in his deed, *where there is no open adverse possession.*" Angell, Limitations, 401.

". . . . if the rightful owner is in the actual occupancy of a part of his tract . . . . he is in the constructive and legal possession, and seisin of the whole, unless he is disseised by actual occupation and dispossession . . . . and then no further than the actual dispossession. . . . ." *Hall* v. *Powell*, 4 Serg. & R. 465.

See also 1 Am. & Eng. Encly. Law (2d ed.), 825; 2 Wood Limitations 656–7; 51 Am. Dec. 641; 102 U. S. 370; 134 U. S. 258.

The foregoing authorities are believed to express the rule of the common law, and to mean that, where there is an adverse possession, possession of a part was never possession of the whole.

If there is anything relating to this question absolutely settled in Virginia it is that, although a senior may be in the actual possession of a part of the interlock, a junior by a subsequent entry within the interlock *can* gain a prescriptive title to the land kept in *pedis positio* by him. 1 Gratt. 229; 2 Minor's Inst. (4th ed.) 582. And this ruling was based, not on any statute, but on the common law.

If the foregoing authorities have been rightly understood, the common law was not changed, but was merely declared, by our statute. And the long-continued uncertainty as to the true solution of the open question is a seeming confirmation of the belief that the common law was as is above argued.

The promised further contribution from Mr. Sims will certainly be of great interest, and it is to be hoped that he will again touch on the question here discussed.

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